



POLICE DEPARTMENT

February 11, 2013

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Charles Yarton
Tax Registry No. 927693
43 Precinct
Disciplinary Case No. 2010-2489

The above-named member of the Department appeared before the Court on October 3, 2012, and December 19, 2012, charged with the following:

1. Police Officer Charles Yarton, currently assigned to the 43 Precinct but while assigned to the Manhattan Gang Squad on or about April 7, 2010, operated a Department vehicle at an excessive rate of speed and disregarded numerous steady red traffic signals.

P.G. 206-03, Page 2, Paragraph 33 VIOLATIONS

P.G. 202-22, Page 2, Paragraph 21 – RADIO MOTOR PATROL OPERATOR

2. Police Officer Charles Yarton, currently assigned to the 43 Precinct but while assigned to the Manhattan Gang Squad on or about August 4, 2010, failed to maintain and preserve his memobook resulting in its loss.

P.G. 202-21, Page 1, Paragraph 18 POLICE OFFICER

3. Police Officer Charles Yarton, currently assigned to the 43 Precinct but while assigned to the Manhattan Gang Squad on or about April 7, 2010, appeared for duty without his uniform pants.

P.G. 204-01, Page 1, Paragraph 7 GENERAL UNIFORM REGULATIONS

4. Police Officer Charles Yarton, currently assigned to the 43 Precinct but while assigned to the Manhattan Gang Squad on or about June 15, 2010, failed to properly perform his assignment in that, while assigned as outside security during a search warrant execution, was instead on the target floor and not providing outside security.¹

P.G. 206 03, Page 1, Paragraph 1 VIOLATIONS

P.G. 206-03, Page 1, Paragraph 26 – VIOLATIONS

The Department was represented by Daniel Maurer, Esq., Department Advocate's Office.

Respondent was represented by John Tynan, Esq., Worth, Longworth & London LLP.

Respondent, through his counsel, entered a plea of Not Guilty to Specification Nos. 1 and 4. He pleaded Guilty to Specification Nos. 2 and 3, and testified in mitigation of the penalty. A stenographic transcript of the trial mitigation record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent, having pleaded Guilty to Specification Nos. 2 and 3, is found Guilty. He is found Guilty of Specification Nos. 1 and 4.

SUMMARY OF EVIDENCE

The Department's Case

The Department called Lieutenant Sean Frey and Sergeant Jack Sinatra as witnesses.

Lieutenant Sean Frey

Frey was assigned to the Manhattan Gang Squad (MGS). He previously was assigned to the Internal Affairs Bureau. Respondent formerly worked under Frey at MGS.

¹ The charges and specifications were served in a format using all capital letters. They are presented here in standardized case.

On Wednesday, April 7, 2010, Frey, Respondent and others were performing a 1625x0100 tour in Times Square. The tour began on April 6 and ran into April 7. Frey and Respondent were assigned to separate unmarked vehicles. Respondent had a partner with him in the vehicle, a Nissan Altima. He was then-Police Officer, now-Detective Jaime Garcia. Respondent was the operator.

After the detail ended, Respondent and Frey drove away westbound on 42nd Street to return to the command base uptown. At Tenth Avenue, there was a red light. Frey was two or three "car lengths" behind Respondent. He observed Respondent go through the light.

Frey testified that a Department decoy yellow cab activated its bubble light and "blinking police lights," and pursued Respondent's vehicle. Respondent went through the red lights at Eleventh and Twelfth Avenues (the West Side Highway) as well. Frey heard a radio transmission from the Midtown North Precinct (MTN) anticrime unit that they were pursuing a possible stolen vehicle. Neither Respondent nor Garcia identified themselves over the radio as members of the service while the anticrime vehicle pursued them. The cab was pursuing Respondent with lights and sirens.

Frey stated that the only flashing lights available in Respondent's vehicle would have been a plug-in red dashboard light. Frey did not observe Respondent put on such a light or attempt to do so.

Frey testified that Respondent turned north onto the West Side Highway, with the decoy taxi still following. Shortly thereafter, an MGS unit transmitted over the radio that the MTN unit (i.e., the cab) was following a Department vehicle and should cease pursuit. The MTN unit did so, three to four blocks north of 42nd Street.

Respondent kept going through red lights, at least 8 to 10 of them.

Frey wanted to stop Respondent, "remove him from the vehicle," and ask him why he was driving like that. At 59th Street, Frey was "approximately a few car lengths" behind Respondent with his light package on in an attempt to stop him. Frey had the light package on since turning onto the West Side Highway.

Once Respondent reached the Henry Hudson Parkway, he began travelling at a high rate of speed. At one point, Frey looked at his speedometer and it read over 80 miles per hour (mph).

It took Frey until 96th Street to catch up to Respondent. With their vehicles side by side, Frey rolled down his window and directed Respondent to pull over. Respondent complied. Frey told him to get out of the car and that he was not going to continue operating the vehicle.

Lieutenant Stephen Phelan ordered Garcia to drive the car back to the command.

When Frey asked Respondent why he was driving like that and refusing to stop, Respondent answered that he thought it was Frey behind him. When Frey asked why Respondent did not stop for him, he had no answer.

Frey opined that there was no apparent reason for Respondent to have driven in that manner.

On cross examination, Frey testified that when he was first assigned to MGS, Respondent already was assigned there.

Frey knew all of the members assigned to the detail. He did not recall if Respondent's vehicle had tinted windows.

Frey was in his vehicle by himself. It was after 0130 hours when the incident took place.

Frey did not try to catch up to Respondent until Frey observed the decoy cab pursuing him and that unit put the pursuit over the air. Frey also went through the red light but did not receive a command discipline (CD) (as Respondent did). He only went through the light because

the MTN anticrime unit was following Respondent. Frey "proceed[ed] with caution" through the light and used his siren.

Frey admitted that Respondent "rolled" through the first red light, rather than going at a high rate of speed. Respondent did not go through any of the lights at full speed, but Frey did not know if he used his horn.

Frey testified that the MTN anticrime unit ceased pursuit after two to three blocks on the West Side Highway. He did not speak to these officers.

Frey conceded that Respondent did not cause any traffic accidents between 42nd and 59th Streets. There were not a lot of people coming from the passenger ship terminal or walking on the street.

Frey more or less kept pace with Respondent until they reached the Henry Hudson Parkway. He was unable to catch up to him on Twelfth Avenue itself even though there was no heavy traffic.

Frey did not know when his speedometer last was calibrated. He claimed to be unable to give a time on how long it took to get from 59th to 96th Street, but said that it was very quick.

Frey did not call Respondent on his cell phone and "ask" him to cease the inappropriate driving.

Respondent pulled onto "the service road coming off 96th Street."

Frey agreed that the CD was issued by Phelan to Respondent on April 19, 2010. Frey "would assume" that because the serial number of the CD was 01-2010, it was the first for the command of that year. He agreed that other officers probably had driven through red lights from January 1, 2010, to April 6, 2010.

Upon questioning by the Court, Frey stated that Garcia did not receive any discipline regarding the incident. Frey did not write Respondent's CD because he himself was involved and wanted to remain impartial. Phelan also observed what occurred. Frey discussed with Phelan and then-Captain Michael Cody (formerly the commanding officer [CO] of MGS) the fact that Garcia did not make any radio transmissions.

On re-cross examination, Frey agreed that the CD accused Respondent of operating at excessive speeds between 42nd and 59th Streets. He did not recall if he said this to Cody.

Sergeant Jack Sinatra

Sinatra was assigned to MGS. On June 15, 2010, he was the team leader for the execution of a search warrant. The warrant concerned an individual possessing a firearm. Sinatra indicated that the target location was on the third floor of [REDACTED]

Sinatra's general practice before executing search warrants was to have a pre tactical meeting. The CO, "the Lieutenant," the team leader and the rest of the team would be present, and a tactical plan ("tac plan") was prepared. Everyone's assignment, radio number and assigned vehicle were on a list. Assignments got handed out verbally to each member. Members "will verbally say they'll, you know, either they'll put it in their memo book or they'll say, you know, understood."

A map also was contained in the tactical plan. Maps informed members of how to arrive at the location, how to exit in case of a life-threatening situation, where the hospital and hospital-transport vehicle would be located, and where the target "apartment" was in relation to "the building," with a floor plan if possible.

Sinatra prepared a tactical plan for the search warrant execution, on or before June 15, 2010 (see Department's Exhibit [DX] 1). Respondent, along with Detective Patrick O'Connor, was assigned to outside security. This was to maintain constant observation of the window and perimeter to ensure that no people, evidence or contraband jumped or was thrown out the window.

If there had been a subsequent change in assignment, Sinatra said, a verbal instruction would have been given, and "maybe a line with also a captain's notification that a change of assignment was needed." There was no further change to Respondent's assignment on that date.

Sinatra testified that a firearm was recovered "[o]utside the landing of the main entrance to the development." Respondent's assignment was to be stationed right outside "that window." During the actual execution, however, Sinatra found Respondent directly behind him as he went up to the third floor. Sinatra confronted him "[a]s much as I could before going into a male's house who is known to have a firearm or information of a firearm." When Sinatra asked Respondent what he was doing there, he shrugged his shoulders as if to say he did not know.

Sinatra stated that a Department member had to be "door entry qualified" to be "in the front line" during a search warrant execution. He did not know if Respondent was so qualified. Respondent's actual position would have made him part of the entry team.

Sinatra testified that the case involving the firearm was "thrown out" because no one had observed how it arrived on the landing.

On cross examination, Sinatra testified that the warrant was obtained within 10 days prior to the date of execution, June 15, 2010. He would have begun preparing for the execution some days prior. He would have checked who was working that day.

Sinatra had been involved in approximately 10 prior search warrant executions with MGS prior to June 15, 2010. Assignments for the execution typically were made the day before the execution, but it could have happened some days before that. These assignments could change until the tac plan was finalized. If a change were needed as "it's going right out the door," the CO could be notified.

Sinatra stated that O'Connor did not receive a CD, but Respondent did. Sinatra assigned O'Connor to one side of the building and Respondent to another. One was the [REDACTED] side and the other was the [REDACTED] side. O'Connor did not receive a CD "because he was not on the side where the firearm or PO Yarton was supposed to be." He was at his assigned location and did not enter the building. "The first time . . . PO O'Connor was we were observing outside the window and he walked around from his assigned post and we saw him outside."

Sinatra admitted not putting down on the tac plan which side of the building the officers were to be stationed, but maintained that he was not required to do so. He did write it on a dry erase board, however, which was displayed to both officers.

Sinatra testified that the gun was found on the top of the concrete awning over the building doorway. This was about five or six feet "to the right" of the window to the apartment. The awning was about seven to eight feet wide and five to six feet out from the building.

Sinatra noted that there appeared to be, based on the building floor plan, four apartments on each floor, one in each corner. Windows from the target apartment were on both the [REDACTED] and [REDACTED] sides.

Sinatra explained that once the suspect was in custody, the officers looked out his open window and saw the firearm on the awning.

Sinatra could not say if the awning was accessible by climbing out a window on the second floor. There were windows on each side of the awning, including on the second floor.

Sinatra identified Respondent's Exhibit [RX] A as a tac plan for a search warrant execution at [REDACTED] on June 15, 2009. Sinatra asserted that he had not seen RX A before the date of trial. He agreed, though, that DX 1, the tac plan for the warrant execution on June 15, 2010, had the same court warrant number as RX A. Respondent was not listed on RX A. Other names were different as well. There was no hospital transport vehicle listed on RX A.

When asked if "the final draft" of the tac plan was "done after the warrant is executed," Sinatra answered, "The final, that's done at a later date, yes." When asked if DX 1 was finalized after the execution, he said, "It was signed. This was done in the morning by me."

Sinatra admitted that the tac plan indicated that the warrant was obtained at approximately 0600 hours on June 15, 2010. This was a mistake on his part, an "accidental typo."

Upon questioning by the Court, Sinatra did not recall whether he executed any search warrants on June 15, 2009.

Sinatra confirmed that the suspect's bedroom was located on the same side of the building as the awning where the gun was found.

A confidential informant (CI) was used to obtain the warrant. The police did not, however, have information as to the alleged manufacturer and model of the target firearm. Sinatra did not know if the warrant listed a color of the weapon. He did not know if the recovered weapon was shown to the CI.

Sinatra did not know if the firearm was tested ballistically to see if it was used in a prior crime. This would have been done in the normal course of events.

On re-direct examination, Sinatra stated that a copy of the tac plan was given to the CO, “the Lieutenant” and the assigned investigator, and one was kept by Sinatra. Copies were not disseminated to the rest of the team under Sinatra’s practice.

On re-cross examination, Sinatra testified that the arresting officer helped him prepare some of the search warrant paperwork, but insisted, “I do my tac plans. . . . I did the tac plan.”

Respondent’s Case

Respondent called Detective Jaime Garcia as a witness and testified on his own behalf.

Detective Jaime Garcia

Garcia was assigned to MGS. He and Respondent had been partners for a couple of years. On April 7, 2010, Garcia held the rank of Police Officer. He worked a detail that day with Respondent in the area of Midtown South, near 42nd Street. They were assigned to an unmarked Nissan Altima. Respondent was the operator.

After the detail was over, Respondent and Garcia drove back to their uptown base. They took 42nd Street and went up the West Side Highway.

Although Garcia asserted that Respondent was driving “[n]ormally,” he admitted that he went through the red light at the West Side Highway, turning right to go north.

When asked if they had “any lights or emergency equipment on,” Garcia answered that their “light” was broken. Frey was right behind them when they left and he had his “lights on.” Garcia did not see any vehicles other than those from their command following them.

After 42nd Street, there were traffic lights until 57th Street on the West Side Highway. Respondent “crept through” another of these lights. Garcia thought that Frey was behind them

the whole time. Around 45th to 47th Street, however, he got a telephone call from another detective. She said that it was someone else, not Frey. Garcia told Respondent that he had better stop "and see what's going on because there are lights behind us." The detective told Garcia that another MGS police officer would put over the air that Respondent and Garcia were from MGS.

Frey caught up to Respondent and Garcia after they pulled over on the Henry Hudson Parkway.

When asked if Respondent was operating the vehicle at an excessive speed, Garcia answered, "Well, I didn't look at the speedometer but you know if you are going excessive rate how it's just flying by no, I would say no." When asked again, he said, "No, not like that, no."

On cross examination, Garcia agreed that their unmarked vehicle looked like any other "normal" car.

Garcia maintained that he did not notice lights in the rear view mirror until he received the phone call from the detective. He said, however, that he saw Frey behind them with his lights on.

Garcia asserted that his radio battery had died. The police officer who put over the air that Respondent and Garcia were from MGS told Garcia "they put your car over the air." That officer "called it off."

On re-direct examination, Garcia agreed that he witnessed a heated conversation between Respondent and Frey. This was where they "waited" for Frey. Respondent still was allowed to operate the vehicle.

On re cross examination, Garcia conceded that he did not remember who drove the vehicle back to the command.

Upon examination by the Court, Garcia testified that in his opinion, Respondent was not driving at excessive speeds.

Garcia stated that normally, to return to the command from midtown on the west side, one would take the 125th Street exit on the Henry Hudson Parkway.

Respondent

Respondent was assigned to MGS for seven to eight years before being transferred in late 2010 to the 43 Precinct. On April 7, 2010, Respondent was assigned to a detail within the confines of the Midtown South Precinct. Once the detail ended, he and Garcia drove south on Broadway and made a right turn onto 42nd Street. Respondent was driving and saw Frey behind him. Respondent did not have the vehicle's emergency lights on because their light package was not working. Frey's emergency lights were on, however.

Respondent admitted that he went through more than one red light. The first was around Eighth or Ninth Avenue. There were utility workers there and they flagged Respondent through.

Respondent made a right onto the West Side Highway and went through another red light. He did so because he saw Frey behind him and his emergency lights were on.

"[T]ypically when we go back to the command and it's late that is what he was doing behind me at the time."

Respondent testified that Garcia received a phone call. He informed Respondent that "it was no longer" Frey behind them but "maybe another Department vehicle." Respondent "pulled over to a slow roll on the West Side Highway" and waited for Frey to catch up. Frey pulled up and "yelled a few things out the window." Respondent "pulled over to the side of the road."

Respondent testified that Frey told him, in sum and substance, "I am not going to get in trouble for you or taking a hit for you." Respondent proceeded back to the command.

After the conversation on the West Side Highway, Frey told Respondent that he was performing a spot inspection on him. Respondent did not have his uniform pants with him because they were being cleaned.

On June 15, 2010, Respondent's MGS unit executed a search warrant at an address in Spanish Harlem. Prior to the execution, the entire team was involved in the tac meeting. There were about 25 people there. Cody, Phelan, Frey, Sinatra and one other supervisor were conducting the meeting.

Respondent testified that he was given RX A as part of the preparation for the execution. This particular tac plan stuck out in his head because it was from the day he was accused of not being where he was supposed to be. Additionally, he remembered not being on the tac plan. At the end of the meeting, Respondent asserted, he was not told his assignment for the execution.

Respondent stated that during the execution of the warrant, he was "behind the entrance team." He contended, "Typically what happens anybody left off the tact plan" would follow the entry team "maybe a couple minutes afterwards" and secure the location and equipment. That was what he did.

Approximately 20 minutes later, one of Respondent's supervisors confronted him. The supervisor said that he was supposed to have been performing front or rear security. Respondent disagreed, arguing that originally, an officer "Young" was assigned to "that security post watching the window." At the last minute, Frey changed the plan and had "Young" go with the entry team. The supervisors forgot to replace him. Respondent stood by his assertions even after his supervisors showed him DX 1 (which Sinatra testified was the actual tac plan).

RX A showed a Police Officer Young, a Detective Garcia (it is unclear whether this was the same Garcia as Respondent's trial witness) and O'Connor as assigned to front security and the hospital transport vehicle. This Detective Garcia and O'Connor were listed there as "DO," i.e., "see above." DX 1 showed the police officer and that Detective Garcia as assigned to "cuff toss," i.e., to detain or restrain anyone found inside the location.

Respondent admitted that he lost his Activity Log. He was hospitalized after a line-of-duty injury. He was having heart problems and was admitted for several days. His clothes were given back to him, but when he returned to his command after two to three weeks, he realized that his book was missing. He asserted that he reported this loss.

On cross examination, Respondent stated that there was no "public emergency" on April 7, 2010, when he left the detail and returned to his command. He asserted, however, that when details ended, it was typical for members to drive with their emergency lights on so as to avoid incurring overtime.

Respondent insisted that it was Frey's lights behind him in the rear view mirror. This occurred as soon as Respondent started driving. He did not see a yellow cab with an activated light and siren package.

Respondent did not recall if it was around 96th Street or further downtown that Frey spoke to him. He agreed that Frey was yelling and using profanity. Frey did not ask him why he was driving the way he did. Respondent conceded that Frey instructed him not to drive the vehicle back to the command, and that he switched places with Garcia.

Respondent agreed that on the RX A tac plan document, there were no radio numbers, but that was because "[i]t wasn't done yet." Some of the vehicle assignment numbers were left blank also.

Respondent was not mentioned orally during the tac meeting. During the execution, he “waited a minute or two and everything was secured and I went up and that’s typically when everybody takes the equipment and dumps it in the hallway.” Respondent conceded that he was trained, but not certified, to be on an entry team.

Respondent agreed that “on August 4, 2010 you were involved in an incident where you went to the emergency room.” He was sure that he was line-of-duty sick that month. He would be surprised if his Central Personnel Index (CPI) (DX 2) did not indicate a sick event in August 2010.

The CPI showed that Respondent was line of-duty sick from June 24 to July 2, 2010, and July 14 to August 1, 2010.

FINDINGS AND ANALYSIS

Specification Nos. 1 & 3

Respondent is charged with operating his vehicle at a high rate of speed and ignoring several red traffic signals. On April 7, 2010, Respondent and other members of the Manhattan Gang Squad were performing enforcement duty in the Times Square area. At tour’s end, Respondent and his partner, Garcia, left in an unmarked vehicle. Their supervisor, Frey, followed them. He noticed that Respondent, who was the operator, went through several red lights as he travelled west on 42nd Street and north on the West Side Highway. Frey also observed that a Department decoy yellow taxicab, not from MGS, activated its lights and was following Respondent’s vehicle. Frey heard over the radio that a Midtown North Precinct unit (i.e., the taxi) was following Respondent as well. Frey caught up to Respondent around the 96th Street exit of the Henry Hudson Parkway after deploying his lights and admonished him.

Garcia and Respondent admitted that Respondent did pass through a couple of red lights but denied speeding. Respondent said that utility workers at the corner of Tenth Avenue and 42nd Street waved them through the intersection because they recognized them as law enforcement officers. They also indicated that while they observed a vehicle behind them with flashing lights, they believed it was Frey, not the MTN decoy cab. It was only when another detective from their unit alerted them by phone that they learned of this. The other MGS unit apparently had heard over the radio what Frey heard – that an MTN unit was following a possibly stolen car, which in fact was being driven by Respondent. Garcia and Respondent averred that their radio was not working.

The admission of Respondent and the testimony of Garcia established that Respondent went through several red lights. No police necessity was established or even offered. A utility worker giving a police officer the courtesy of going through a red light that she had no known authorization to control is no different than the officer choosing to go through it himself.

Frey gave credible testimony establishing that Respondent was speeding once he reached the Henry Hudson. Keeping pace with Respondent, Frey looked at his speedometer and saw that it read 80 mph. There also was a tacit admission from Garcia and Respondent when they indicated that MGS officers often returned from midtown to their uptown base using high speeds toward the end of tour so as to avoid incurring overtime. That is not a valid reason to disobey traffic regulations.

Although Respondent's counsel suggested in opening statements that there would be evidence of animus toward him from supervisors at MGS, no such evidence was revealed at trial. At most, Frey and Sinatra were upset because Respondent caused problems for them.

Accordingly, the Court finds Respondent Guilty of Specification No. 1, operating a Department vehicle at excessive speed and disregarding numerous red lights.

Respondent also pleaded Guilty to Specification No. 3, not having his uniform pants. He stated that when he returned to the command, Frey conducted a spot inspection on him. Respondent's pants were at the cleaners, he alleged. Accordingly, he is found Guilty.

Specification No. 4

In the fourth specification, Respondent is charged with failing to perform his assignment properly. MGS performed a search warrant execution on June 15, 2010, about two months after the speeding incident in the Times Square area. It was at a specific apartment in an apartment building and targeted an individual allegedly in possession of a firearm. Sinatra, the team leader, testified that at the pre-execution tac meeting, assignments were given out to all of the team members. It was explained to Respondent, orally and on the written tac plan form, that he was assigned as outside security. This meant that he was supposed to prevent prisoners or contraband from leaving the scene.

When the team made its way into the building and neared the target apartment, Sinatra noticed that Respondent was right behind him, with the entry team. Respondent had no explanation for this.

Respondent asserted that he received a different tac plan (RX A) and his name was not on it. He followed the standard operating procedure of the command and backed up the entry team.

The evidence showed that RX A was, at most, a document used in other search warrant executions, littered with prior cuttings and pastings. Numbers in the building address were transposed. The date of execution was one year off. There were several assignment spots to

which members were not assigned; instead, the abbreviation “DO” was used. O’Connor was listed but not assigned to any post. Although Sinatra testified that a CI was used, RX A did not list a CI. DX 1 did, however, with the CI’s identification number. Doors were described in a bare way as “metal,” as opposed to DX 1, which described them in much greater depth. Vehicle assignments and radio numbers were missing.

Thus, while RX A might have been a working draft of the tac plan, DX 1 was completed as the final plan. The Court does not credit Respondent’s claim that RX A was handed out as a final plan because it was too incomplete to serve any useful purpose. Moreover, it was Respondent’s responsibility to ascertain where he was supposed to be if he thought he was not on the tac plan. Cf. Case No. 80354/04 (Apr. 4, 2005) (inter alia, officer failed to confirm with CI the exact address of target building on narcotics operation, leading to search of wrong apartment and three residents being injured). Respondent’s claim that it was standard procedure to back up the entry team if left off the list is incredible in light of the fact that search warrant executions are dangerous and Department members’ roles are prescribed tightly.

Accordingly, the Court finds Respondent Guilty of Specification No. 4, failing to “properly perform his assignment” in that he was assigned as outside security during a search warrant execution but instead was found on the target floor.

Specification No. 2

Respondent pleaded Guilty to Specification No. 2 and as such is found Guilty. The specification charged that, “on or about August 4, 2010,” he “failed to maintain and preserve his memobook resulting in its loss.” Respondent asserted that he lost the Activity Log because he was transported to the hospital after a line-of-duty illness and his belongings were misplaced.

During cross examination, however, the Department produced Respondent's Central Personnel Index (DX 2), which showed no sick event on August 4, 2010.

Respondent apparently was not sick on the date referenced in the specification. The specification, however, reads "on or about." Respondent had substantial sick leave prior to the date, from July 14, 2010, to August 1, 2010. Thus, at the very least, the Department did not disprove Respondent's claim in mitigation that he lost the Activity Log when his clothes were removed after he was hospitalized for a line-of-duty illness.²

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on September 29, 2000. Information from his personnel file that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of several charges of misconduct. During a search warrant execution, he disregarded the tac plan and went into the target building with the entry team instead of providing outside security as he was directed. On another occasion, he drove away from a detail at excessive speeds while also ignoring several red traffic signals. At a spot inspection conducted by his supervisor afterward, it was discovered that he did not have his uniform pants. Finally, Respondent pleaded Guilty to losing the Activity Log covering the dates of the above incidents.

Perhaps the most serious charge against Respondent is his failure to perform his assignment as directed by the tac plan. There was a pre-execution tactical meeting at which

² In the investigator's report accompanying the charges, dated August 25, 2010, the investigator stated that Respondent informed him during his official Department interview that he had lost the Activity Log covering "the above dates," i.e., the dates of the speeding and missing uniform pants incidents, and the search warrant incident.

assignments were handed out. Respondent did not dispute that he received a tac plan, but the one he presented at trial was not the one the team actually was using. In any event, Respondent backed up the entry team rather than providing outside security as directed by the actual tac plan. This had serious consequences apart from the overall admonition that search warrant executions are dangerous scenarios and the rules must be followed precisely. Here, a gun was found on the awning outside the suspect's apartment window, down and to the side. MGS theorized that the suspect threw it out the window when he realized the police were at or near his door. The firearm could not be used as evidence against him, however, because no one was outside there to see him toss it. The People would not be able to prove possession in the criminal proceedings. Had Respondent been there as ordered, it is possible, if not probable, that he would have seen the suspect toss the gun.

The Department recommended a penalty of the forfeiture of 30 vacation days. This is supported by precedent. See Case No. 79437/03 (Nov. 3, 2004) (30 days for detective squad officer who failed to alert supervisor of notification from outside police agency that they had in custody someone wanted by New York City Police Department; by the time the assigned detective learned of the notification, the suspect had been released). Even if a lesser penalty might be warranted, see 80354/04 (9 days), 30 days still is appropriate here because of Respondent's other misconduct. See Case No. 83588/08 (Aug. 19, 2009) (30 days for, inter alia, failing to comply promptly with order to transfer prisoners to another command; when officer complied, he drove prisoner van unsafely, speeding and ignoring traffic signs; officer also failed to maintain Activity Log). The Court also is aware of Respondent's prior disciplinary history, see Confidential Mem., infra.

Accordingly, the Court recommends that Respondent be penalized with the loss of 30 vacation days.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner – Trials

APPROVED

MAR 04 2018
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER CHARLES YARTON
TAX REGISTRY NO. 927693
DISCIPLINARY CASE NO. 2010-2489

In 2011 and 2012, Respondent received an overall rating of 4.5 "Extremely Competent/Highly Competent" on his annual performance evaluation. He was rated 4.0 "Highly Competent" in 2010. He has received 11 medals for Excellent Police Duty and 2 for Meritorious Police Duty. [REDACTED]
[REDACTED]

Respondent has been the subject of one prior adjudication. In 2005, he pleaded Guilty to giving the wrong address for sick report, failing to call the sick desk when reporting sick a second day, and neglecting to inform the Department of a change of address in a timely fashion. For this misconduct he forfeited 18 vacation days.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner Trials